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U.S. SMALL BUSINESS ADMINISTRATION
WASHINGTON, D.C. 20416

OFFICE OF CHIEF COUNSEL FOR ADVOCACY

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementation of Sections of the	)	MM Docket No. 93-215
Cable Television Consumer Protection	)	
and Competition Act of 1992:	)	MM Docket No. 92-266
Rate Regulation	)	

Comments of the Chief Counsel for Advocacy
of the United States Small Business Administration
on the Further Notice of Proposed Rulemaking

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November 16, 1994

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I. *Introduction*

Since the enactment of the Cable Television Consumer Protection and Competition Act of 1992 (1992 Act), the Federal Communications Commission (FCC or Commission) has been mired in an attempt to craft an appropriate rate regulatory regime. The Commission has developed two alternative forms of rate regulation both of which were adapted from the FCC's long experience of regulating telephony service pursuant to Title II of the Federal Communications Act of 1934. The primary mechanism for regulating rates is a price cap model in which rate increases from a base point are limited to inflation and certain costs beyond the control of the cable operator. In the alternative, the FCC also permitted cable operators to file conventional cost-of-service showings in support of the rates charged.

The Commission recognized that the rate regulation scheme may impose burdens on small cable operators and small cable systems.[1] To alleviate some of those problems, the FCC adopted so-called transition relief for both small operators and small systems.[2] The Commission defined a small operator as one with less than 15,000 total subscribers without regard to the number of systems owned by the operator. A small multiple system operator was defined as one with less than 250,000 total subscribers that met certain other system characteristics (not relevant for this discussion). The FCC did not seek approval of these size standards as required by § 3(a)(2) of the Small Business Act.[3]

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[1] The 1992 Act mandates that the FCC examine regulatory alternatives that reduce the burdens on small cable systems -- those with less than 1,000 subscribers. A small system may be owned by an operator with just that one system or may be the subsidiary of the largest multiple system operators (MSOs) in the United States.

[2] Small operators were not required to take a 17% across-the-board rate cut. However, they also were not permitted to raise their rates beyond the inflation even if their rates were below the benchmark levels determined by the FCC for purposes of imposing price caps. Small multiple system operators were eligible for streamlined rate reductions of 14%.

[3] That failure is the subject of ongoing litigation. The Office of Advocacy strongly disagrees with the Commission's argument that they are in full compliance with the provisions of the Small Business Act.

The Small Business Act was amended at the end of the 103d Congress to authorize agencies and the Administrator to approve size standards for other acts based on a variety of relevant criteria and not solely on gross revenue for companies involved in service industries. Thus, the Commission if it was so inclined could propose a definition, pursuant to the Small Business Act procedural requirements, that used some other

(continued...)

The Commission noted that submissions by various parties raised legitimate questions whether some systems and operators, particularly smaller ones, have unusually high costs.[4] As a result, the FCC decided to undertake a cost study of these systems and operators. The FCC had planned to limit that study to systems and operators eligible for transition relief. However, the Commission has not yet undertaken that study and the Office of Advocacy believes that the Commission, among other things, is awaiting the outcome of the instant rulemaking.

The Office of Advocacy, in subsequent filings, noted that simply limiting cost studies to firms that satisfy the criteria for transition relief is simply inadequate. Many other cable operators have cost structures similar to those being studied by the Commission but do not fit the Commission small operator or multiple operator definitions. Therefore, the Office of Advocacy requested that the Commission undertake further rulemaking for two purposes: 1) to define the firms whose costs would be studied; and 2) to determine the type of regulatory relief that small cable operators should be granted.

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[3](...continued) standard or combination of standards such as subscriber limits and density of population.

[4] In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, MM Docket No. 92-266, at ¶ 118. (April 15, 1994) (hereinafter cited as Second Reconsideration Order).

The Commission acceded to the request of the Office of Advocacy and commenced this further notice of proposed rulemaking. In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, MM Docket Nos. 92-266, 93-215, Further Notice of Proposed Rulemaking (September 26, 1994) (FNPR). The Commission requests comments on appropriate size standards for small cable operators in order to form a more complete record. FNPR at ¶ 11. Although the Commission does not specify what it will do with the new data, the Office of Advocacy suspects that it will use the data to define the universe of firms to include in its cost studies. The Office of Advocacy also suspects that the Commission may utilize the data developed in the FNPR to establish which operators should be given regulatory relief.

II. *Appropriate Size Standards*

The Office of Advocacy, as it has stated on numerous other occasions, believes that the Commission should look to the regulation of telephony as a model for developing size standards appropriate for the cable industry. The Office of Advocacy will not reiterate its analysis of the parallels between the two industries; rather it incorporates by reference its previous comments in these dockets on the similarities between rate regulation of telephone companies and cable operators.[5] In addition, the Commission's recent foray into establishing size standards for licensing of broadband personal communications services can prove useful in developing an appropriate regulatory size standard.

A. The $100 million standard

In various places in the Commission's regulations and issuance,[6] the FCC has distinguished between those companies with revenue in excess of $100 million (Tier 1 carriers) from regulated service and those with less revenue. The decision by the Commission in the Armis Order, 2 FCC Rcd 6283 (1987) is illustrative of this distinction. In that order, the FCC required all Tier 1 local exchange carriers (LECs) be required to install an automated reporting and management information system (ARMIS). The Commission decided not to apply that to other carriers because they did not have the resources to install such a system. Thus, the FCC recognized that Tier 1 carriers have the ability to absorb regulatory burdens that other carriers do not.

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[5] As a result, the Office of Advocacy does not support adoption of the $11.5 million dollar size standard developed by the Small Business Administration for the purpose of carrying out its regulations.

[6] 47 C.F.R. §§ 32.11, 64.101; *see also* In the Matter of Policy and Rules for Dominant Carriers, CC Docket No. 87-313, Second Further Notice of Proposed Rulemaking at ¶ 625 (April 17, 1989); Armis Order, 2 FCC Rcd (1987).

Similarly, the Commission imposes significant accounting requirements on Tier 1 LECs that are not required of other LECs. Again the main distinction among carriers is the capacity, usually through economies of scale, for Tier 1 carriers to comply with more burdensome regulatory requirements.

Finally, the Commission imposition of interconnection requirement only on Tier 1 carriers further evidences FCC's recognition that large firms (those with revenue in excess of $100 million) have a greater capacity to absorb the costs of regulation than small firms. The Commission stated "[r]equiring smaller LECs to offer expanded interconnection might also tax their resources...." In the Matter of Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Second Report and Order at ¶ 56 (October 18, 1992).

The logic behind this distinction in telephony is equally applicable to regulated cable service. Cable operators with revenue in excess of $100 million dollars generally serve dense urban and suburban areas in which costs for providing service are lower.[7] In addition, they have sufficient resources, both administrative and technical, to absorb the not insignificant

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[7] The Office of Advocacy realizes that many cable companies with revenue in excess of $100 million also serve small communities and rural areas. That recognition does not detract from the general point that their costs, on a per subscriber basis, are lower than smaller companies -- a point conceded by the Commission when it adopted transition relief and decided to undertake a cost study of small firms.

amounts of regulatory requirements associated with rate regulation. Therefore, the Commission, based on its experience of regulating telephony service, could apply the same logic and consider a different rate regulatory treatment for all cable operators with less than $100 million dollars in revenue.

B. The $40 million standard

The Commission in a variety of settings has established a separate classification of telecommunication companies at $40 million. The FCC understands that companies with than $40 million dollars in revenue face very different regulatory and financial problems than firms with revenue in excess of $40 million.

For example, the FCC mandated that a number of seats on the board of the National Exchange Carrier Association be set aside for LECs with revenue of less than $40 million. This allocation demonstrates Commission recognition that the interests of these companies are substantially different than those with revenue in excess of $40 million.

Similarly, the Commission established special incentives to ensure proper participation by small businesses in the development of personal communication services. The FCC adopted the Office of Advocacy's rationale that the $40 million dollar standard isolates those companies that have significantly greater difficulty in obtaining capital than large enterprises. In the Matter of Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Fifth Report and Order at ¶ 175, 59 Fed. Reg. 37,566 (July 22, 1994).

The Office of Advocacy opines that the rationale behind the $40 million tier also applies to cable operators. These firms have the least capacity to absorb regulatory burdens and do not have adequate access to financing. Therefore, it is these companies that are in need of special regulatory assistance, such as higher benchmark regulatory rates or streamlining of administrative costs.

C. The 100,000 subscriber standard[8]

The final distinction made by the Commission can be found in its implementation of competitive bidding for spectrum used to deliver broadband personal communication services. The FCC was mandated by Congress to provide extra incentives for participation in auctions by rural telephone companies. Congress understood that without some assistance these telephone companies would not have the financial wherewithal to construct a personal

[8] The Commission also has established a 50,000 access line standard for certain regulatory purposes and for complying with the Regulatory Flexibility Act. The Office of Advocacy does not believe that this standard is sufficiently large to include all those companies that require some form of regulatory relief.

communication services network. The Commission defined these companies as those with less than 100,000 access lines. The FCC reasoned that this definition would include all telephone companies interested in providing service to rural areas. *Id.* at ¶ 198.

A similar argument can be made about the profile of the cable industry. While there are some very large companies that operate cable systems in rural areas, the vast majority of providers of this service have fewer than 100,000 subscribers. In addition, preliminary data supplied to the Commission by the Small Cable Business Association reveals that these smaller operators generally face higher programming and service costs due to the lack of population density. If the Commission recognizes the need to help rural telephone companies obtain spectrum, then it must surely recognize the peculiar regulatory-relief needs of cable operators with less than 100,000 access lines.

III. *Conclusion*

The Commission's request for more information on the appropriate definition of a small cable operator is only the first step in a long process. The Commission must commit to expanding its cost studies to include all those firms that it considers to be small after seeking approval of the Small Business Administration as required by § 3 of the Small Business

Act. For the purposes of collecting the most accurate data, the Office of Advocacy believes that the Commission should select the largest universe of firms (those with less than $100 million in regulated revenue) for participation in the cost study. However, the Office of Advocacy understands that the Commission must balance the comprehensiveness of the study with the need for conducting the study with all deliberate speed and providing rate relief to those small firms that have the greatest need.[9] As a result, the Office of Advocacy would not object to the selection of either of the other definitions discussed in these comments.

Once the FCC has collected the data, only then can it begin the process of devising appropriate regulatory relief for small cable operators. The cost study may reveal that one of the standards suggested in these comments is appropriate or that some intermediate standard may provide a better definition of small business. In the alternative, the cost data may show that a

[9] The Office of Advocacy suspects that the vast majority of firms with the greatest need of rate relief are those with revenue of less than $40 million dollars.

significant variation exists among small firms and that regulatory relief needs to be tiered to the size of the firm.[10]

Respectfully submitted,

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[10] The FCC's current size standards are important to cable operators because they delineate the firms eligible for transition relief. The Office of Advocacy opines that the Commission should take this opportunity to adopt a new transition relief size standard from one of the three recommended in these comments. The Office of Advocacy also strongly urges that the adoption of any such size standard be submitted to the Administrator for approval pursuant to § 3 of the Small Business Act.